No. 607

Office - Supreme Court,
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HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

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WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit Michigan),
Appellee.

APPLICATION FOR WRIT OF CERTIORARI

ROBERT D. HEITSCH,
Attorney for Plaintiff
and *Appellant.*

Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

AMERICAN BRIEF AND RECORD COMPANY, GRAND RAPIDS 2, MICHIGAN

IN THE

SUPREME COURT OF THE UNITED STATES

Application of William J. Heitsch, Executor of the Estate of Janet H. Heitsch, Deceased, for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review Order affirming the District Court for the Eastern District of Michigan, Southern Division, entered November 19, 1952. In the case of:

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit Michigan),
Appellee.

Now comes William J. Heitsch, Executor of the Estate of Janet H. Heitsch, deceased, appellant in the above entitled cause, by his attorney, Robert D. Heitsch, and hereby respectfully makes application for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the determination made on November 19, 1952, by said United States Court of Appeals for the Sixth Circuit in the above entitled cause. In that connection applicant respectfully shows:

1. He was duly appointed executor of the estate of Janet H. Heitsch, deceased, by the Probate Court for the County of Oakland, Michigan. He paid in behalf of said estate under protests, specifically raising questions of validity hereinafter set forth, certain estate taxes to Giles Kavanagh, United States Collector of Internal Revenue at Detroit, Michigan. Claim was filed for repayment of said taxes on the basis that they were unconstitutional as set

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forth in the protests which was denied. Suit was started in the District Court of the United States for the Eastern District of Michigan, Southern Division, at Detroit, Michigan, for the recovery of the same (Circuit Court of Appeals printed record, pages 1 — 12). Issue was joined thereon (Circuit Court of Appeals printed record, pages 13 — 16).

Trial was had at which most of the essential facts were stipulated (Court of Appeals printed record, pages 17 — 96). Judgment of no cause for action for the defendant was entered (Circuit Court of Appeals printed record, page 156). Appeal was taken to the Circuit Court of Appeals for the Sixth Circuit on April 14, 1951 (Circuit Court of Appeals printed record, page 158).

On November 19, 1952, the United States Court of Appeals for the Sixth Circuit made the following decision affirming the action of the District Court:

"No. 11513
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM J. HEITSCH, Executor of the
Estate of JANET H. HEITSCH, Deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector
of Internal Revenue at Detroit, Michigan,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.
(Decided November 19, 1952)

Before Simons, Chief Judge; McAlister and Miller, Circuit Judges.

Per Curiam. Appellant, as Executor of the Estate of Janet H. Heitsch, deceased, filed suit to recover estate taxes paid by him under protest, attacking various pertinent Internal Revenue Code provisions as

unconstitutional. He contends that Section 3760 (a) and (b), and Section 3761 (a) of Title 26, U. S. C. A., authorizing compromises and closing agreements, are an attempt to confer legislative functions upon the executive department of the government, in violation of Article I, Section 1, of the Federal Constitution, vesting all legislative power in Congress; that the foregoing sections purport to authorize officers of the executive branch to substitute their judgment for legislative authority so as to arrive at a tax which could represent a different percentage of the value of each similar estate in any part of the United States, contrary to Article I, Section 8, of the Constitution, which requires all duties, impositions, and excises to be uniform throughout the United States; that Section 811 (c) 2 governing transfers, in contemplation of death

1. 26 U. S. C., 1496 Ed.

2. Internal Revenue Code, as amended by Section 7 of Act of October 25, 1949, c.720, 63 Stat. 891. or taking effect at death, purported to deprive appellant's decedent of the opportunity afforded others with like estates who did not die within a period of two years after the first effective date of the estate tax, to dispose of her estate by gift, inasmuch as on such effective date, she was confined to a hospital with illness which caused her death; that the difference between estate and gift tax rates was so great as to violate Article I, Section 8, of the Constitution, and also amounted to taking property for public use without just compensation and without due process of law, in derogation of the Fifth Amendment; that no adequate machinery is provided to procure equalization of assessment for estate tax purposes under the estate tax provisions throughout the United States, resulting in the lack of uniformity required by Article I, Section 8; that estate tax rates effective under Section 935 of the Internal Revenue Code were, on September 21, 1941, as to persons dying after that date, so excessive as to deprive beneficiaries of estates of property without due process of law and without just compensation, contrary to the Fifth Amendment; that estate tax provisions encroach up-

on the exclusive functions of the states to control descent and distribution of property, because of the fact that the rates are so excessive that they can not be regarded as a mere taxing incident, and that the machinery set up for administration of the Act and the actual attempt to administer it are so inadequate that they reasonably interfere with and prolong, beyond a point of any reasonable taxing incident, the administration of estates, which is merely a state function, in violation of the Tenth Amendment reserving such rights to the states that the difference between taxes on transfers by gift and disposition of property by will or descent is an attempt to induce dispositions by gift during lifetime rather than by will or descent; that power over such policy was expressly reserved to the states, and under no provision of the Constitution, is delegated to the federal government.

The above mentioned sections of the statute granting authority to the administrative officers named therein to settle and compromise matters relating to tax liability, require them to assess and collect taxes according to the specific rates and incidence of taxation, as set forth in various sections of the Internal Revenue Code. No authority is conferred therein to apply other rates or to exclude taxable items.

3. As amended by Section 401 of the Revenue Act of 1941, c. 412, 55 Stat. 687.

In this case, the constitutional questions with respect to Section 3760 (a) and (b) and Section 3761 (a) and (b) of the Internal Revenue Code are not properly before us for adjudication, for these provisions are concerned with closing agreements and compromises of tax cases; and it was stipulated that no closing agreement or compromise was proposed or entered into in this case, and the district court made findings to this effect. Appellant, therefore, has not shown that he is within the class of persons with respect to whom the Act is claimed to be unconstitutional, and that the alleged unconstitutional features injure him; and it is fundamental that constitutional questions will not be decided upon hypotheses, or in

advance of the necessity for an adjudication. These statutory provisions, in any event, merely provide administrative devices to facilitate the execution of the revenue laws.

As to the uniformity of the estate tax, the constitutional requirement of uniformity of excise taxation is satisfied when, by the provisions of the tax law, the rule of liability under it is the same in all parts of the United States. The same estate tax rates are applied generally throughout the United States. Opportunities to settle and compromise disputes as to the existence of tax liabilities are available to all taxpayers throughout the nation under the existing provisions of the Internal Revenue Code. Hence, the federal estate tax statute meets the constitutional test of uniformity.

As to the requirement of inclusion within the gross estate of the value of property transferred in contemplation of death, and the provision for a rebuttable presumption that any transfer of a material part of such property made by a decedent within two years prior to his death, was made in contemplation of death, it appears that no such transfers made by decedent within her lifetime were included in her taxable estate. The attack upon the constitutionality of the statute because of these requirements and provisions is, for appellant, based purely on a hypothesis. He does not come within the class of persons with respect to whom the Act is unconstitutional and who suffer thereby.

The fact that there were differences of considerable amount between gift taxes and estate taxes does not result in the taking of property without due process of law. It was within the power of Congress to tax both gifts and estates and its motives are not open to judicial scrutiny. Moreover, the contention that the estate tax rates were so excessive as to constitute the taking of property without due process of law, contrary to the Fifth Amendment, is without merit. Appellant only refers to the tax paid by the estate of which he is executor, and nothing is submitted to overcome the presumption of the constitutionality of the Act. The argument that the variance between the

gift tax rates, and the estate tax rates in effect on November 8, 1941, constituted an attempt by Congress to control the devolution of property in derogation of the rights secured to the states can not be sustained; an dthe same may be said of appellant's contention that Congress in the statutory provisions governing the estate tax, attempted to induce disposition by gift during lifetime rather than by will or descent. The motives of Congress in enacting laws are beyond the scope of judicial inquiry for the purpose of questioning such legislation. The burden is upon one who attacks the constitutionality of a statute, and the presumption is in favor of constitutionality. We find no denial of due process in the statutory provisions.

In consideration of the foregoing, the judgment of the district court is affirmed."

Applicant hereby seeks leave to review said decision of the Sixth Circuit for the following reasons:

1. The determination that the constitutional questions with respect to Sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.), and Section 3761 (a) and (b) Internal Revenue Code (Section 26.3761 (a) and (b) U. S. C. A.) were not properly before the court for adjudication because it was stipulated that no closing agreement or compromise was proposed or entered into in this case, is in conflict with the decision in the case of *Ely-Walker Drygoods Company vs. United States*, 34 Fed. 2d. 429, by the United States Court of Appeals, Eighth Circuit.

2. Said sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.), which expressly provide for compromises and settlement agreements as to federal taxes (in this case Federal estate taxes levied under Section 810 I. R. C. (26.810 U. S. C. A.) and Section 935 I. R. C. (26.935) U. S. C. A.) render such taxes void because in violation of Article I, Section 1, of the United States Constitution.

3. Said Sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.) render

such taxes void because of the uniformity requirements in Articles I, Section 8, United States Constitution.

4. Said Sections 3760 (a) and (b) Internal Revenue Code (Sections 26.3760 (a) and (b) U. S. C. A.) render such taxes void because in violation of Amendment V of the Constitution of the United States.

5. The wide variance between estate tax rates levied under Section 810 I. R. C. and 935 I. R. C. (Sections 26.810 and 26.935 U. S. C. A.) as of November 8, 1941, and the taxes levied under the gift tax rates, Section 1001 I. R. C. (Section 26.1001 U. S. C. A.) constitute an attempt on the part of the United States government to influence persons in the disposition of their estates in violation of the Fifth and Tenth Amendments of the Constitution of the United States.

6. The estate tax rates in effect on November 8, 1941, under Section 935 I. R. C. (Section 226.935 U. S. C. A.) were so excessive as to constitute the taking of property without due process of law, contrary to the provisions of the Fifth and Tenth Amendments to the Constitution of the United States.

A further question of practice which the application may involve is:

Within the time for applying for writ of certiorari to review the decision of a Circuit Court of Appeals, is the Circuit Court of Appeals the proper place to apply for substitution as party defendant of a successor officer, in this case federal director of Internal Revenue, who succeeds to all of the rights and responsibilities of a predecessor officer, in this case federal collector of Internal Revenue, the succession in office having occurred after the case reached the Circuit Court of Appeals?

The constitutional statutory provisions which we believe authorize this review are as follows:

1. U. S. Constitution Article III, Sections 1 and 2,
2. Section 28.1254 (1) U. S. C. A.,
3. U. S. Supreme Court Rule 38, Section 5 (b).

We respectfully ask that the writ of certiorari be granted to review these questions.

We develop in the attached brief the reasons why we believe the questions here presented are substantial.

Respectfully submitted,

William J. Heitsch,
Executor of the Estate of
Janet H. Heitsch, Deceased.

By Robert Dawson Heitsch,
His Attorney.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased,
Plaintiff and Appellant,
vs. No. 11513

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan,
Defendant and Appellee.

NOTICE OF HEARING

TO:

Philip A. Hart
U. S. District Attorney,
Federal Building,
Detroit, Michigan.

Please take notice that the within motion will be brought on for hearing on Monday, February 2, 1953.

Robert D. Heitsch,
Attorney for Plaintiff
and Appellant.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

Dated: January 20, 1953.

UNITED STATES OF AMERICA
UNTED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM J. HEITSCH, Executor of the
Estate of JANET H. HEITSCH, Deceased,
Plaintiff and Appellant,

vs. No. 11513

GILES KAVANAGH, United States Collector of
Internal Revenue at Detroit, Michigan,
Defendant and Appellee.

MOTION TO SUBSTITUTE DEFENDANT AND APPELLEE

Now comes the plaintiff and appellant by his attorney, Robert D. Heitsch, and moves the court now here for an order substituting Albert M. Menninger, United States Director of Internal Revenue at Detroit, Michigan, for Giles Kavanagh, United States Collector of Internal Revenue at Detroit, Michigan, as defendant and appellee in the above cause.

This motion is based upon the files and records in said cause and the affidavit of Robert D. Heitsch, hereto attatched and made a part hereof.

Robert D. Heitsch,
Attorney for Plaintiff
and Appellant.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

Dated: January 20, 1953.

STATE OF MICHIGAN
SS.
COUNTY OF OAKLAND

Robert D. Heitsch, being duly sworn, deposes and says that he is the attorney for the plaintiff and appellant in the above entitled cause.

Deponent further says that within the last six months there has been substituted for the office of United States Collector of Internal Revenue at Detroit, Michigan, the office of United States Director of Internal Revenue at Detroit, Michigan.

Deponent further says that within the last six months and subsequent to the appeal taken from the District Court to this court in said cause Giles Kavanagh, former United Ctates Collector of Internal Revenue at Detroit, Michigan, has died and Albert M. Menninger has been appointed to the office of United States Director of Internal Revenue at Detroit, Michigan; that he has taken over the official duties of the former United States Collector of Internal Revenue at Detroit, Michigan, and should be substituted as party defendant and appellee in the above entitled cause.

Robert D. Heitsch.

Subscribed and sworn to before me this 20th day of January, A. D. 1953.

Irene Powers,
Notary Public, Oakland County, Mich.
My commission expires October 16, 1955.

No. 607

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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, deceased,
Appellant,

vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan),
Appellee.

BRIEF OF APPELLANT IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

ROBERT DAWSON HEITSCH,
Attorney for Appellant.

Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

AMERICAN BRIEF AND RECORD COMPANY, GRAND RAPIDS 2, MICHIGAN

SUBJECT INDEX

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I. Does the determination that the constitutional questions raised with respect to Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C. is not properly before the court for adjudication because it was stipulated that no closing agreement or compromise was proposed or entered into in this case conflict with Ely Walker Drygoods Co. vs. United States, 34 Fed. 2d 429, decided by the United States Court of Appeals, Eighth Circuit? 1

II. Do Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C.; 26.3760 (a) and (b) U. S. C. A. and 26.3761 (a) and (b) U. S. C. A. which expressly provide for compromises and settlement agreements as to federal taxes (in this case federal estate taxes levied under Section 810 I. R. C. (26.810 U. S. C. A.) and Section 935 I. R. C. (26.935 U. S. C. A.) render such taxes void because in violation of Article I, Section I, of the United States Constitution? 2

III. Do said Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C. result in a violation of the uniformity requirement of Section 8, Article I, of the Constitution of the United States? 3

IV. Do said Sections result in a violation of the due process clause of the Fifth Amendment of the Constitution of the United States? 6

V. Does the wide variance between estate tax rates levied under Section 810 I. R. C. and 935 I. R. C. (Sections 26.810 and 26.935 U. S. C. A.) as of November 8, 1941, and the taxes levied under the gift tax rates, Section 1001 I. R. C. (Section 26.1001 U. S. C. A.) constitute an attempt on the part of the United States government to influence persons in the disposition of their estates in violation of the Fifth and Tenth Amendments of the Constitution of the United States? 5

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VI. Are the rates effective November 8, 1941, under Section 935 I. R. C., Section 26.935 U. S. C. A., so excessive as to constitute the taking of property contrary to the due process clause of the 5th and 10th Amendments to the Constitution of the United States? 12

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IN THE

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WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, deceased,
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vs.

GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan, (ALBERT M. MENNINGER, Director of Internal Revenue at Detroit, Michigan, Successor to GILES KAVANAGH, United States Collector of Internal Revenue at Detroit, Michigan),
Appellee.

BRIEF OF APPELLANT IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

I.

Does the determination that the constitutional questions raised with respect to Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C. is not properly before the court for adjudication because it was stipulated that no closing agreement or compromise was proposed or entered into in this case conflict with Ely-Walker Drygoods Co. v. United States, 34 Fed. 2d. 429, decided by the United States Court of Appeals, Eighth Circuit?

We submit that *U. S. Supreme Court Rule* 38, Section 5 (b), warrants review here because there is substantial conflict between the instant decision and the decision in *Ely & Walker Drygoods Co. vs. United States,* 34 Fed.

2d. 249 (certiorari denied 281 U. S. 735; 74 L. ed. 1165). In that case the court held that one who had made and executed a compromise as to tax liability could not thereafter question the validity of the tax. This was apparently based on Section 3760 (b) *I. R. C.* (quoted under No. II) following. Because of this decision and the refusal of this Court to grant certiorari to review it, plaintiff and appellant on advice of counsel paid the tax under express protests involving the constitutional questions here presented. Here the Circuit Court of Appeals, Sixth Circuit, holds that plaintiff and appellant has not shown that he is within the class of persons with respect to whom the act is claimed to be unconstitutional because it is stipulated that no closing agreement or compromise was proposed or entered into. (Third paragraph of decision).

II.

Do Sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C.; 26.3760 (a) and (b) U. S. C. A. and 26.3761 (a) and (b) U. S. C. A., which expressly provide for compromises and settlement agreements as to federal taxes (in this case federal estate taxes levied under Section 810 I. R. C. (26.810 U. S. C. A.) and Section 935 I. R. C. (26.935 U. S. C. A.) render such taxes void because in violation of Article I, Section 1, of the United States Constitution?

Section 3760 (a) *I. R. C.*, 26.3760 (a) *U. S. C. A.*, provides:

> (a) Authorization — The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.
>
> (b) Finality — If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing

of fraud or malfeasance, or misrepresentation, of a material fact —

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Section 3761 (a) *I. R. C.*, 26.3761 (a) *U. S. C. A.* provides:

(a) Authorization — The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of the Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record — Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of —

(1) The amount of tax assessed.

(2) The amourt of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

These provisions authorize representatives to the executive department of government to substitute a different figure for what the legislative department acting within its sphere has specified as the rate of taxation.

The record in this case contains the following concession:

> "As your Honor puts it, we have settled cases all the time and we could settle this case here if we could get together maybe, or not this case but maybe another case where there was a factual situation. Why, we do that all the time. The Government would be very, very hampered in its functioning if the administrative body could not do that. So we think that is a proper administrative duty, the administration of these taxes. Sometimes there are questions that have to be settled factually and otherwise." (134-135 printed record).

The general proposition of the delegation of a legislative function to some other department of government is condemned in:

> *Panama Refining Co. vs. Ryan,* 293 U. S. 388, 420, 79 L. ed. 446, 458, and
> *Schechter vs. United States,* 295 U. S. 495, 529, 79 L. ed. 1570, 1580.

The fundamental objection to such a delegation is that it results in government by individuals as opposed to government by Law. A tax collecting plan authorizing compromise or modification by the tax administration officials was held to be subject to this infirmity in *Richey vs. Wells,* 123 Fla. 284; 166 So. 817. The reasoning is fundamentally sound. On the basis of these authorities we believe this is a substantial question.

III.

Do said sections 3760 (a) and (b) and 3761 (a) and (b) I. R. C. result in a violation of the uniformity requirement of Section 8, Article I, of the Constitution of the United States?

We quote from the decision of the lower court on this point:

> "Opportunities to settle and compromise disputes as to the existence of tax liabilities are available to

all tax-payers throughout the nation under the existing provisions of the Internal Revenue Code. Hence the federal estate tax statute meets the constitutional test of uniformity." (Third paragraph before conclusion in opinion.

This argument does not square with reality. In view of the expanse and the extent of the population of this country "The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service" must include a host of persons. Their reactions, motives and judgments must be as various as their number. Results are tabulated from reported federal cases where such compromises were involved.

Reports	Summary of Results		
	Amount Assessed or claimed	Amount paid under compromise	%
1. *Walker vs. Alamo Foods*, 16 Fed. 2d. 694	$ 342,697.75	$ 318,039.70	92.83
2. *Ely & Walker Drygoods Co. vs. U. S.*, 34 Fed. 2d. 429	960,093.51	672,065.46	70.00
3. *DePuy vs. U. S.*, 35 Fed. 2d. 990	3,173,293.01	1,972,016.81	62.14
4. *Hoad vs. U. S.*, 59 Fed. 2d. 125	1,537.57	729.73	47.46
5. *Backus vs. U. S.*, 59 Fed. 2d. 242	1,600,000.00	788,879.21	49.30
6. *Staten Island Hygeia Ice & Cold Storage Co. vs. U. S.*, 85 Fed. 2d. 68	529.05	25.00	4.72
7. *Cloister Printing Co. vs. U. S.*, 100 Fed. 2d. 355	3,360.00	1,000.00	29.76

If pictured in graphical form uniformity should present a straight line or at least a line curving smoothly. A graph of the above percentages would result in a very

crooked broken line. Some of these decisions would appear to present obvious phases, to-wit:

No. 2, Settlement at an arbitrary percentage.
No. 6, Acquiesence in the face-saving of an administrative officer.
No. 7, Settlement at an arbitrary figure.
Nos. 1, 3, 4, 5, Quaere.

These cases demonstrate that there cannot be uniformity of compromise in fact or theory. We get back to the same proposition that government should be by law, not by individual whim, caprice or judgment. On this basis we submit the question is substantial.

IV.

Do said sections result in a violation of the due process clause of the Fifth Amendment of the Constitution of the United States?

In *Heiner vs. Donan,* 285 U. S. 312, 76 L. ed. 772, Syllabus No. 4 reads as follows:

> "4. The restraint imposed upon legislation by the due process clause of the Fifth and Fourteenth Amendments is the same."

The same language is found in the text of the opinion at 285 U. S. 326; 76 L. Ed. 799. It is supported by citation of *Coolidge vs. Long,* 282 U. S. 582, 596; 75 L. Ed. 562, 566, 51 S. C. A. 306.

See also:

> *Curry vs. McCanless,* 307 U. S. 357, 369; 83 L. Ed. 1339, 1349 (Headnotes 15 and 16).

We believe there is no sound reason why the Fifth Amendment should not be applied to federal laws on the same basis that the Fourteenth Amendment is applied to state laws. There is no express requirement in the federal constitution for uniformity of state taxation or uniformity of administration of state tax laws by state officials.

The question of uniformity of administration of state tax laws was before this court in:

Sioux City Bridge Co. vs. Dakota County, 260 U. S. 441, 67 L. Ed. 340;
Cumberland Coal Co. vs. Board of Revision, 284 U. S. 23, 76 L. Ed. 146;
Iowa Des Moines National Bank vs. Bennett, 284 U. S. 239, 76 L. Ed. 265, 28 A. L. R. 979;
Hillsboro Township vs. Cromwell, 326 U. S. 620, 90 L. Ed. 358.

We quote from *Hillsboro Township vs. Cromwell*, 326 U. S. 620, 624; 90 L. Ed. 358, 363:

> "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

The "discrimination" referred to in the foregoing sentence and in the other cases cited under this heading arose from the fact that the letter of the law was enforced against the complaining taxpayer. The taxation would have been uniform if it had been so enforced as to others; but a different and less burdensome rule was applied to others by the tax administrative branch of the state government. The practice was condemned on the basis that it violated the 14th amendment to the United States as to those persons against whom the tax law was enforced as written.

In view of the express command of uniformity of Federal taxation in Article I, Section, 8, U. S. Constitution, we submit that the instant case presents a stronger case for the taxpayer in this case than was involved in the cases cited under this heading. For this reason we believe this question is substantial.

V.

Does the wide variance between estate tax rates levied under Section 810 I. R. C. and 935 I. R. C. (Sections 26.810 and 26.935 U. S. C. A.) as of November 8, 1941, and the taxes levied under the gift tax rates, Section 1001 I. R. C. (Section 26.1001 U. S. C. A.) constitute an attempt on the part of the United States government to influence persons in the disposition of their estates in violation of the Fifth and Tenth Amendments of the Constitution of the United States?

The court has uniformly held over from an early date in its history that the transfer of property by will or descent is an exclusive function. It follows that it is reserved to the state by the Tenth Amendment to the constitution:

Mager vs. Grima, 8 How. U. S. 490; 12 L. Ed. 1168, 1170;
Magoon vs. Scales, 76 U. S. 23, 27; 19 L. Ed. 545, 546;
United States vs. Fox, 94 U. S. 315, 320; 24 L. Ed. 192, 193;
Jones vs. Habersham, 107 U. S. 174, 179; 27 L. Ed. 401, 403;
Vaughan vs. Hutchinson, 165 U. S. 566, 569, 41 L. Ed. 827, 829;
Clarke vs. Clarke, 178 U. S. 186; 44 L. Ed. 1028;
Campbell vs. California, 200 U. S. 87, 94; 50 L. Ed. 382, 387;
United States vs. Burnison, 339 U. S. 87; 94 L. Ed. 675.

A new schedule of added federal estate rates, 1001 I. R. C. 26.1001 U. S. C. A., and gift tax rates, 935 I. R. C., 26.935 U. S. C. A. was enacted by the revenue act of 1941. Prior to this amendment this court had decided:

Milliken vs United States, 283 U. S. 15; 75 L. Ed. 809;
Burnet vs. Guggenheim, 288 U. S. 280; 77 L. Ed. 748, and
In re *Sanford's Estate*, 308 U. S. 39; 84 L. Ed. 20.

One phase of those cases is summarized in the following from In re *Sanford's Estate,* 308 U. S. 39, 42; 84 L. Ed. 20, 22:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Sections 319 et seq. of the Revenue Act of (June 2) 1924, 43 Stat. at L. 253, Chap. 234, re-enacted at 501 et seq. of the (June 6) 1932 Act, 47 Stat. at L. 169, Chap. 209, 26 USCA 550, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title. See *Burnet vs. Guggenheim,* 288 U. S. 280, 287, 77 L. Ed. 748, 752, 53 S. Ct. 369."

By the 1941 Revenue Act, Congress, charged with notice of these decisions, made this change in rates of estate taxes effective from and after the date of adoption, September 20, 1941 (Sec. 401C Revenue Act 1941), but postponed the increase in gift tax rates (Sec. 1001 I. R. C., 26.1001 U. S. C. A., 402 (a) Revenue Act 1941) to January 1, 1942. Prior to the adoption of the 1941 Revenue Act and after January 1, 1942, there was a consistent ratio between the estate tax rates established by Section 935 I. R. C., 26.935 U. S. C. A., and the gift tax rates established by Section 1001 I. R. C., 26.1001 U. S. C. A., to-wit the rate of 4 to 3 This ratio existed when *Milliken vs. The United States, Burnet vs. Guggenheim,* and In re *Sanford's Estate,* all supra, were decided. The effective date for taxation of this estate under Sections 810 I. R. C., 26.810 U. S. C. A., and 935 I. R. C., 26.935 U. S. C. A., was November 8, 1941. On that date the ratio between estate tax rates and a combination of estate tax rates and gift tax rates for persons not excluded from the exercising the gift tax by section 811 (c) I. R. C., 26.811 (c) U. S. C. A., was approximately 4 to 1 instead of 4 to 3. This follows

because Congress postponed the effective dates of the new gift tax rates to January 1, 1942, but made the new estate tax rates effective on the date of enactment.

This has all the earmarks of a bargain offer to induce action by individuals effecting and controlling a function reserved to the states by the Tenth Amendment.

> In *Bailey vs. Drexel Furniture Co.* 259 U. S. 20, 66 L. Ed. 817, 21 A. L. R. 1432;
> *United States vs. Butler,* 297 U. S. 1; 80 L. Ed. 477, 102 A. L. R.;
> *Carter vs. Carter Coal Co.,* 298 U. S. 238; 80 L. Ed. 1160,

this court held that such a purpose may not be legally accomplished in the guise of a tax law.

We quote also from *Gregg Dying Co. vs. W. G. Querry,* 286 U. S. 472, 476; 76 L. Ed. 1232, 1236:

> "In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the *operation and effect of the statute as applied and enforced by the State.* St. Louis S. W. R. Co. vs. Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. 99; Hanover F. Ins. Co., vs. Harding (Hanover F. Ins. Co.. vs. Carr), 272 U. S. 494, 509, 510, 71 L. Ed. 372, 380, 49 A. L. R. 713, 47 S. Ct. 179" (Italics ours).

The contention here made was overruled in the second paragraph before the conclusion in the opinion of the court below on the basis that the deceased had not attempted to exercise the gift tax privilege and that plaintiff is not in a position to raise the question. We contend that having paid the tax under protest based upon this specific reason among others, the issue should not be evaded in this manner.

The statement in the lower court's opinion in the last paragraph: "The motives of Congress in enacting laws are beyond the scope of judicial inquiry for the purpose of questioning such legislation", is in direct conflict with

the decisions in *Bailey vs. Drexel Furniture Co.; United States vs. Butler; Carter vs. Carter Coal Co.* and *Gregg Dying Co. vs. W. G. Querry,* all supra. If the doctrine were adopted where constitutional limitations are brought in question, it would eliminate one of the most important functions of the judicial branch of the government. For these reasons we believe this question is substantial.

The will of the deceased is dated August 22, 1941 (20 Circuit Court of Appeals Record). During the month of August, 1941 she was confined to the Simpson Memorial Hospital at Ann Arbor, Michigan, suffering from her last illness (24, 100, Circuit Court of Appeals Record). The last sentence of Sec. 811 (c) I. R. C., 26.811 (c) U. S. C. A., reads:

> "Any transfer of a material part of his property in the nature of a final disposition thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this sub-chapter."

We submit that this provision presents as to this estate, the same class of arbitrary enactment which was held in: In *Heiner vs. Donnan,* 285 U. S. 312, 76 L. Ed. 772, to be in violation of Amendment V of the United States Constitution. The re-enactment of Section 811 (c) I. R. C., 26.811 (c) U. S. C. A., on September 20, 1941, as part of the code virtually commanded that this estate pay according to the new rates set up in Section 935 I. R. C., 26.935 U. S. C. A., while permitting persons with similar estates who were in good health on September 20, 1941, to dispose of their estates in a manner calling for about one-fourth as much tax, even though such other persons may have also died on November 8, 1941, or any other date between September 20, 1941, and December 31, 1941. For this further reason we think this point is substantial.

VI.

Are the rates effective November 8, 1941, under Section 935 I. R. C., Section 26.935 U. S. C. A., so excessive as to constitute the taking of property contrary to the due process clause of the 5th and 10th Amendments to the Constitution of the United States?

If the federal government may not attempt to exercise a control over state functions under the guise of a tax law as held in *Bailey vs. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817; 21 A. L. R. 1432; *United States vs. Butler*, 297 U. S. 1, 80 L. Ed. 477; 102 A. L. R. 914, and *Carter vs. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, it stands to reason that there must be a limit as to how far it may by a tax law disrupt or prevent the operation of such a function — in this case the descent or distribution of property on death. Any other conclusion would conflict with the holding in *United States vs. Burnison*, 339 U. S. 87; 94 L. Ed. 675.

We seek a judicial determination here as to whether there has been such a substantial encroachment as to be in violation of the Tenth Amendment of the United States Constitution. This question is clearly stated in the first paragraph of the opinion of the court below as one of the questions raised. The affirmation of the decision of the trial court overrules the contention. For the reasons here outlined we believe the question is substantial.

VII.

Should Albert M. Menninger, Federal Director of Internal Revenue at Detroit, Michigan, be substituted as defendant and appellee for Giles Kavanagh, Federal Collector of Internal Revenue at Detroit, Michigan.

On January 21, 1953, we forwarded to the Circuit Court of Appeals of the Sixth Circuit, a motion to substitute Albert W. Menninger, Director of Internal Revenue at Detroit, Michigan, as defendant and appellee for Giles

Kavanagh, Collector of Internal Revenue at Detroit, Michigan, because:

1. The office of director of internal revenue has been substituted for that of collector of internal revenue;
2. Giles Kavanagh has since died.

Supporting brief accompanied the motion and was noticed for hearing February 2, 1953. This motion was served by registered mail upon Albert M. Menninger, and by regular mail upon the District Attorney, Phillip Hart, whose name is published in the Circuit Court of Appeals calendar as attorney for defendant and appellee.

The Clerk of the Circuit Court of Appeals returned the motion questioning the right or advisability of filing it in that court. At about the same time we received a telegram dated January 29, 4:57 P. M. from Charles C. Lyon, Assistant Attorney General, Washington, D. C., asking for an adjournment "to afford the government an opportunity to consider whether the substitution requested in the motion is necessary or proper." The motion was promptly returned to the Circuit Court of Appeals, Sixth Circuit, with the suggestion (copy to Mr. Lyon) that it should not be continued to a date later than February 9, 1953, because the time in which to apply for this writ of certiorari expires February 17, 1953.

We are now in receipt of a certified copy of the petition filed as of February 2, 1953, and file the same herewith. We respectfully ask that the substitution be here made or considered made if certiorari is granted. The time required for printing this brief and the accompanying application make it impractical to await the determination of the court of appeals on this motion.

Statutory clarification of the situation is established by Section 3 (a) and (b) Public Law 567, 82nd Congress, second Session, July 16, 1952. It provides:

> "(20.977) Sec. 3 of Public Law 567, 82nd Congress, 2nd Session, July 16, 1952. —
>
> Clarification of Existing Law as to Jury Trial in Actions for Recovery of Internal Revenue Taxes.
>
> Sec. 3 (a) Nothing in Reorganization Plan Numbered 26 of 1950 or Reorganization Plan Numbered 1 of 1952 shall be construed to impair any right or

remedy, including trial by jury, to recover any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

(b) For the purpose of any action to recover any such tax, penalty, or sum, all statutes, rules, and regulations referring to the collector of internal revenue shall be deemed to refer to the officer whose act or acts referred to in subsection (a) gave rise to such action. The venue of any such action shall be the same as under existing law."

(copied from Prentice Hall Federal Tax Guide 1953, page 20,062, Section 20.977).

Specific authority to make such substitution in either court of origin or any appellate court is found in Section 11 (a) of Act of February 13, 1925, Chapter 229, 43 Stat. 936 (Lawyers Co-operative Publishing Company U. S. Supreme Court Digest 1949, Vol. entitled Constitution and Rules, pages 39 and 40).

CONCLUSION

For the reasons outlined above we hereby apply for a writ of certiorari to the United States Court of Appeals, Sixth Circuit, to review the decision in this case, and for substitution of Albert M. Menninger, Director of Internal Revenue at Detroit, Michigan, as party defendant and appellee, for Giles Kavanagh, Collector of Internal Revenue at Detroit, Michigan.

Respectfully submitted,

ROBERT DAWSON HEITSCH,
Attorney for Appellant.
Business Address:
68 W. Huron St.,
Pontiac 14, Michigan.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 607

WILLIAM J. HEITSCH, Executor of the Estate of JANET H. HEITSCH, Deceased, *Petitioner*

v.

THOMAS GILES KAVANAGH, Administrator of the Estate of GILES KAVANAGH, Deceased, Collector of Internal Revenue at Detroit, Michigan

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 152-156) is reported at 97 F. Supp. 749. The opinion of the Court of Appeals (R. 170-174) is reported at 200 F. 2d 178.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1952. (R. 170.) The petition for a writ of certiorari was filed on February 16, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether certain provisions of the federal estate tax law are constitutional.

STATEMENT

Janet H. Heitsch died on November 8, 1941. Her will was duly admitted to probate, and taxpayer was appointed executor of her estate. (R. 152.) A federal estate tax return was filed by the executor which reported gifts made to persons named as residuary legatees in her will. No transfers by decedent during her lifetime were included in her taxable estate. Federal estate taxes and interest in the amount of $68,621.89 were paid under protest by taxpayer. A claim for refund of the full amount paid for estate taxes was denied. No closing agreement or compromise was proposed or entered into by the executor or any other person on behalf of the estate of the decedent. (R. 153.)

The District Court entered judgment against the taxpayer. (R. 156.) The Court of Appeals affirmed. (R. 170-174.)

ARGUMENT

No basis for certiorari is presented. The constitutionality of the federal estate tax law has long been settled. *Knowlton* v. *Moore,* 178 U.S. 41; *New York Trust Co.* v. *Eisner,* 256 U.S. 345. The Court of Appeals in its *per curiam* opinion (R. 170-174) painstakingly examined each of the numerous contentions of unconstitutionality which were made by petitioner. It correctly concluded that, as to some, he had no standing to complain; and that, as to the others, the arguments were patently insubstantial. There are no conflicting decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.

APRIL, 1953.

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